



[BILLING CODE: 6750-01S]

FEDERAL TRADE COMMISSION

[File No. 151 0048]

Drug Testing Compliance Group, LLC; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order -- embodied in the consent agreement -- that would settle these allegations.

DATES: Comments must be received on or before January 13, 2016.

ADDRESSES: Interested parties may file a comment at

<https://ftcpublic.commentworks.com/ftc/dtcgroupconsent> online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “Drug Testing Compliance Group - Consent Agreement; File No. 151-0048” on your comment and file your comment online at

<https://ftcpublic.commentworks.com/ftc/dtcgroupconsent> by following the instructions on the web-based form. If you prefer to file your comment on paper, write “Drug Testing Compliance Group - Consent Agreement; File No. 151-0048” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the

Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex D),
Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: William Lanning (202-326-3361), Bureau of
Competition, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade
Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that
the above-captioned consent agreement containing consent order to cease and desist, having been
filed with and accepted, subject to final approval, by the Commission, has been placed on the
public record for a period of thirty (30) days. The following Analysis to Aid Public Comment
describes the terms of the consent agreement, and the allegations in the complaint. An electronic
copy of the full text of the consent agreement package can be obtained from the FTC Home Page
(for December 14, 2015), on the World Wide Web, at <http://www.ftc.gov/os/actions.shtm>.

You can file a comment online or on paper. For the Commission to consider your
comment, we must receive it on or before January 13, 2016. Write “Drug Testing Compliance
Group - Consent Agreement; File No. 151-0048” on your comment. Your comment - including
your name and your state - will be placed on the public record of this proceeding, including, to
the extent practicable, on the public Commission Website, at
<http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to
remove individuals’ home contact information from comments before placing them on the
Commission Website.

Because your comment will be made public, you are solely responsible for making sure
that your comment does not include any sensitive personal information, like anyone’s Social
Security number, date of birth, driver’s license number or other state identification number or

foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any “[t]rade secret or any commercial or financial information which . . . is privileged or confidential,” as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).¹ Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/dtcgroupconsent> by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#!home>, you also may file a comment through that website.

If you file your comment on paper, write “Drug Testing Compliance Group - Consent Agreement; File No. 151-0048” on your comment and on the envelope, and mail your comment

¹ In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before January 13, 2016. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing consent order ("Consent Agreement") from Drug Testing Compliance Group, LLC ("DTC Group"). The Commission's Complaint alleges that DTC Group violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by inviting a competitor to enter a customer allocation agreement.

Under the terms of the proposed Consent Agreement, DTC Group is required to cease and desist from communicating with its competitors about customers and prices. The Consent Agreement also prohibits DTC Group from entering into, participating in, inviting, or soliciting an agreement with any competitor to allocate customers, to divide markets, or to fix prices.

The Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will

become part of the public record. After 30 days, the Commission will review the Consent Agreement again and the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the accompanying Decision and Order (“Proposed Order”).

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment. It is not intended to constitute an official interpretation of the proposed Consent Agreement and the accompanying Proposed Order or in any way to modify their terms.

I. The Complaint

The allegations of the Complaint are summarized below:

DTC Group markets and sells an array of services to commercial drivers, commercial trucking firms, and other persons that facilitate compliance with various regulations administered by the Department of Transportation and the Federal Motor Carrier Safety Administration, including regulations relating to drug and alcohol testing, safety audits, and driver qualifications.

DTC Group primarily utilizes telemarketing and the internet to market and sell its services. DTC Group competes with several firms throughout the United States offering similar services.

DTC Group and Competitor A market and sell similar services in direct competition. Beginning in 2013 and continuing to date, DTC Group and Competitor A have competed for one another’s customers by offering lower prices for the services they sell. In some instances, one firm can induce a customer, whose contract is terminable at will, to switch service providers by offering lower prices.

On or about June 27, 2014, the president of DTC Group, David Crossett, contacted Competitor A to complain that Competitor A’s sales personnel had induced a DTC Group

customer to switch service providers. Mr. Crossett requested a meeting with Competitor A to discuss the matter.

Mr. Crossett met with the principals of Competitor A on July 10, 2014. Mr. Crossett proposed that the firms agree not to solicit or compete for one another's customers. Specifically, Mr. Crossett proposed that DTC Group and Competitor A should reciprocally agree to refrain from selling or attempting to sell a service to a customer if the rival firm had previously arranged to sell the same service to the customer. Mr. Crossett referred to this arrangement as "First Call Wins," and explained that such agreement would permit each company to sell its services to customers without fearing that its rival would later undercut it with a lower price offer.

II. Analysis

Mr. Crossett's communication to Competitor A is an attempt to arrange a customer allocation agreement between the two companies. The invitation, if accepted, would be a *per se* violation of the Sherman Act.² The Commission has long held that invitations to collude violate Section 5 of the FTC Act, and this is unaltered by the Commission's recent Statement on Section 5. In that Statement, the Commission explained that unfair methods of competition under Section 5 "must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."³ Potential

² *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372 (6th Cir. 1988) ("[A] horizontal agreement between two competitors to refrain from seeking business from each other's existing accounts ... is plainly a form of customer allocation and, hence, is the type of 'naked restraint' which triggers application of the *per se* rule of illegality."); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (10th Cir.), *cert. denied*, 437 U.S. 903 (1978).

³ Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) (Section 5 Unfair Methods of Competition Policy Statement), *available at*

violations are evaluated under a “framework similar to the rule of reason.”⁴ Competitive effects analysis under the rule of reason depends upon the nature of the conduct that is under review.⁵

An invitation to collude is “potentially harmful and . . . serves no legitimate business purpose.”⁶ For this reason, the Commission treats such conduct as “inherently suspect” (that is, presumptively anticompetitive).⁷ This means that an invitation to collude can be condemned under Section 5 without a showing that the respondent possesses market power.⁸

The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.⁹ First, unaccepted

https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf. Commissioner Ohlhausen dissented from the issuance of the Section 5 Unfair Methods of Competition Policy Statement. See <https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy>.

⁴ Section 5 Unfair Methods of Competition Policy Statement.

⁵ See, e.g., *California Dental Ass’n v. FTC*, 526 U.S. 756, 781 (1999) (“What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”).

⁶ *In re Valassis Commc’ns, Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment); see also Address by FTC Chairwoman Edith Ramirez, Section 5 Enforcement Principles, George Washington University Law School at 5 (Aug. 13, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

⁷ See, e.g., *In re North Carolina Bd. of Dental Examiners*, 152 F.T.C. 640, 668 (2011) (noting that inherently suspect conduct is such that can be “reasonably characterized as ‘giv[ing] rise to an intuitively obviously inference of anticompetitive effect.’”) (citation omitted).

⁸ See, e.g., *In re Realcomp II, Ltd.*, 148 F.T.C. ___, Docket No. 9320, 2009 FTC LEXIS 250, at *51 (Oct. 30, 2009) (Comm’n Op.) (explaining that if conduct is “inherently suspect” in nature, and there are no cognizable procompetitive justifications, the Commission can condemn it “without proof of market power or actual effects”).

⁹ See, e.g., *In re Valassis Commc’ns, Inc.*, 141 F.T.C. 247 (2006); *In re Stone Container*, 125 F.T.C. 853 (1998); *In re Precision Moulding*, 122 F.T.C. 104 (1996). See also *In re McWane, Inc.*, Docket No. 9351, *Opinion of the Commission on Motions for Summary Decision* at 20-21 (F.T.C. Aug. 9, 2012) (“an invitation to collude is ‘the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5’”) (citing the Statement of

solicitations may facilitate coordination between competitors because they reveal information about the solicitor's intentions or preferences. Second, it can be difficult to discern whether a competitor has accepted a solicitation. Third, finding a violation may deter similar conduct that has no legitimate business purpose.¹⁰

III. The Proposed Consent Order

The Proposed Order has the following substantive provisions:

Section II, Paragraph A of the Proposed Order enjoins DTC Group from communicating with its competitors about rates or prices, with a proviso permitting public posting of rates.

Section II, Paragraph B prohibits DTC Group from entering into, participating in, maintaining, organizing, implementing, enforcing, inviting, offering, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

Section II, Paragraph C bars DTC Group from urging any competitor to raise, fix, or maintain its price or rate levels, or to limit or reduce service terms or levels.

Sections III-VI of the Proposed Order impose reporting and compliance requirements on DTC Group.

The Proposed Order will expire in 20 years.

By direction of the Commission.

Chairman Leibowitz and Commissioners Kovacic and Rosch, *In re U-Haul Int'l, Inc.*, 150 F.T.C. 1, 53 (2010)). This conclusion has been endorsed by leading antitrust scholars. See P. Areeda & H. Hovenkamp, VI ANTITRUST LAW ¶ 1419 (2003); Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission's Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST, Spring 2000, at 69. In a case brought under a state's version of Section 5, the First Circuit expressed support for the Commission's application of Section 5 to invitations to collude. See *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012).

¹⁰ *In re Valassis Commc'ns, Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment).

Donald S. Clark,
Secretary.

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